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No. 99-353

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

ANDREW K. KIM,

Petitioner,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, for its division, the University of Alabama School of Medicine, HAROLD J. FALLON, M.D., and KATHLEEN G. NELSON, M.D.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

This case raises the question of what process is due a student dismissed for non-academic reasons. The Eleventh Circuit applied a standard considerably lower than that which would have been applied to this case by the First, Sixth, and Eighth Circuits. Furthermore, the Eleventh Circuit ignored the standard set out in this Court's opinions, which require a higher level of procedural protections than given here where a dismissal is based on non-academic grounds.

Respondents try to deny the existence of a conflict by claiming that Kim was dismissed on "academic" grounds, and hence not entitled to any heightened process applied to disciplinary dismissals. This argument is contrary to the

findings of the district court and the admissions of Dr. Nelson.

First, the district court credited Dr. Nelson's testimony that Kim's dismissal was *not* academic in nature. Pet. App. B11. Indeed, the non-academic character of the dismissal was the sole basis given by the University for depriving Kim of its academic dismissal procedures as set out in the student handbook or as applied in practice. Pet. App. B13. For respondents to now claim that the dismissal was "academic" is more than a bit disingenuous.

Second, the Eleventh Circuit mistakenly imputed to the district court the view that this was a "hybrid case (involving aspects of both academic and disciplinary dismissal)." Pet. App. A4. Aside from misdescribing the district court's finding and the testimony from respondents, the Eleventh Circuit's view plainly recognizes at least *some* disciplinary aspect to the dismissal. Respondents' current claim in this Court that the dismissal was purely academic thus was not the basis of the Eleventh Circuit's decision and lacks support in either court below.

Third, Dr. Nelson has admitted that Kim was not dismissed for failure to pass the USMLE under the University's three-strikes rule. Nelson conceded that all but the final June 1996 failure to sit for the exam were excused, and that had he sat for and failed the exam he would not have been dismissed and could have sat for the exam again. R1-19, Nelson Dep., at 51-57, 63. Thus, under the University's academic requirements, Kim would have had only one strike had he failed in June 1996, demonstrating that he was dismissed for some other reason than the three-strikes policy. That reason was essentially a supposed failure to do as he was told – to sit for the exam – and thus his dismissal constitutes punishment for an alleged infraction rather than an academic failing.[1]

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[1] Respondents dispute the description of Dean Nelson's testimony that Kim would have been allowed two more strikes had he sat for and failed the June 1996 USMLE. BIO at 6. But they fail to quote a single sentence

Respondents recognize that "Kim had not failed any of his courses in the first two years of medical school," but nonetheless argue that he "simply failed to satisfy an academic prerequisite for advancement." BIO at 5.[2] But this argument misperceives the nature of the *deprivation* in this case. Kim is not complaining that he was not *advanced* to his third year. Rather, he is challenging his complete dismissal from the medical school, and the deprivation of his last two "strikes" under the University's three-strikes rule regarding the USMLE. While Kim's non-advancement may have been a rote application of an academic requirement that he pass the USMLE before advancing, his expulsion from school was punitive and not at all based on the academic requirements for advancement or the three-strikes rule.

Respondents make a misplaced attempt to distinguish *Gorman* v. *University of Rhode Island*, 837 F. 2d 7, 13-14 (CA1 1988), *Hall* v. *Medical College of Ohio at Toledo*, 742 F. 2d 299, 308 (CA6 1984), *cert. denied*, 469 U. S. 1113 (1985), and *Woodis* v. *Westark Community College*, 160 F. 3d 435, 440 (CA8 1998). That each of those cases involved expulsions for worse alleged behavior than occurred here only goes to show that the punishment in this case does not fit the crime, not that respondents' actions were not punitive. But those cases certainly are adequate for the purpose they were cited: to show the standard of due process in non-academic dismissal cases. In this case Kim was expelled for the sup-

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of testimony to the contrary. Respondents' bare citation to the Nelson Deposition is curious, given that the testimony therein fully supports Kim's position that his dismissal was not based on the academic three-strikes requirement. *See* R1-19, Nelson Dep., at 63 ("Q. Okay. If he had failed the June exam, would he then have been – in your opinion, would you have then allowed him to take it in September? A. In my opinion, yes. Q. If he had failed it in September, would you have allowed him to take it in June of '97 for the third shot at the USMLE Step 1 exam? A. Yes, probably.").

[2] Kim was actually a strong "B" student. He was never placed on academic probation, as is the usual case before an academic dismissal.

posed misconduct of not sitting for an exam, even though he believed he was merely burning one of his three strikes by doing so. He was not expelled for failure to *pass* the academic requirement, but rather was deprived – for disciplinary reasons – of his remaining two chances to meet the academic requirement.

Respondents' attempted defense of the due process analysis applied by the Eleventh Circuit, BIO at 7-8, is both incorrect and irrelevant. It is incorrect because it describes the process due for academic dismissals, not the higher process required for non-academic dismissals, and it is irrelevant because it does not deny that a different standard would have been applied to this case in three other Circuits. Respondents' discussion of the district court's conclusion that they also satisfied the higher test for disciplinary dismissals, BIO at 8, begs the question of whether the district court applied the proper scale to begin with. As noted in the Petition, what the opinions below mischaracterized as the higher standard for disciplinary dismissals was actually this Court's standard for academic dismissals, with the opinions mischaracterizing the supposed academic-dismissal standard in a manner well below what this Court requires in such cases.[3]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[3] Petitioner does not raise his substantive due process claim in this Court, and hence respondents' discussion of such claims is irrelevant to consideration of certiorari on the procedural due process issue.

Respectfully submitted,

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